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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE LEOPOLDO MARTINEZ, Defendant and Appellant.	E063487 (Super.Ct.No. INF1302645) OPINION

APPEAL from the Superior Court of Riverside County. Edward Forstenzer, Judge. (Retired judge of the Mono Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Randall D. Einhorn, and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION[1]

A jury convicted defendant Jose Leopoldo Martinez of committing 12 sexual offenses against more than one victim.[2] The trial court sentenced defendant to state prison for a determinate sentence of four years plus an indeterminate sentence of 25 years to life.

On appeal, defendant asserts that his trial counsel was ineffective. He argues that the three victims and their mother each had independent reasons to accuse him falsely and that defense counsel did not adequately investigate. We disagree and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution's Evidence

1. Molestation of Am. (Counts 1 through 5)

Am. was born in 1987 and lived in Desert Hot Springs with her mother, R.N., and her sister, Ny., and her adopted sisters, Zy. and Zt.[3] R.N. and defendant began living

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] Counts 1 and 6, section 288.5; counts 2, 3, 4, 7, 8, and 9, section 288, subdivision (a); counts 5 and 10, section 288, subdivision (c); count 11, section 289, subdivision (i); count 12, section 288a, subdivision (b)(2); and section 667.61, subdivision (e)(4).

[3] Zy. and Zt. were adopted by R.N. and defendant.

together when Am. was five or six years old. R.N.'s oldest daughter, Ro., and defendant's son, Al., visited them occasionally.

Am. and defendant watched television together and shared an interest in soccer. When Am. entered middle school, defendant became possessive and controlling. Defendant began molesting Am., touching her above the navel. The first incident occurred when Am. was 11 or 12 years old. She woke up and found defendant holding her with one hand and touching her breasts, underneath her shirt, with his other hand.

At least 10 more times, defendant entered Am.'s bedroom and touched her breasts. More than once, defendant tried to put his hand down her pants but she always managed to struggle away.

The last time defendant molested Am. was during the summer before her junior year of high school. Am. had fallen asleep on the couch and awakened to find defendant pressed against her from behind. Defendant was moving his body against hers. He had one arm wrapped around her shoulders and his other hand inside her brassiere. When he tried to slide his hand down her pants, A.M. struggled with defendant until he eventually became frustrated and stopped.

2. Molestation of Ny. (Counts 6 through 9)

Ny. was born in 2000. Defendant began molesting her when she was in the fifth grade. While Ny. was sleeping on the couch, defendant slipped his hands underneath her

brassiere and underwear, and rubbed her breasts and vagina.[4] The molestation happened three to seven times a week until Ny. was in the middle of the sixth grade.

3. Molestation of Fa. (Counts 10 through 12)

Fa. was born in 1994. Defendant and R.N. were her foster parents from August 2009 until the middle of 2010. On five occasions while Fa. was 15 and 16 years old, defendant molested her in their home.

Once, while they were watching television defendant suddenly grabbed Fa. and pulled her onto his lap. He kept touching her breasts and genitals, over her clothes, until he heard another child walking down the hall. Defendant pushed Fa. away and acted like nothing happened.

On another occasion, defendant came into Fa.'s room while she was taking a nap. Defendant began touching the area between her thighs. He unbuttoned and lowered her jeans, touched her genitals, and then moved his fingers in and out of her vagina. He also touched her breasts underneath her clothes. Defendant kept touching Fa. while she tried to push him away.

Another time, while Fa. was sleeping, defendant unbuttoned and lowered her jeans, touched her genitals, and then inserted his tongue in her vagina while rubbing her breasts underneath her clothes.

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[4] The use of the word "vagina" is anatomically imprecise. Contrary to the prosecutor's statement that the vagina is "where the pee comes from," the vagina and the urethra are separate parts of the anatomy. The vagina is an internal organ but, in these proceedings, the reference usually seems be to external genitalia.

In another incident, he rubbed her genitals while rubbing his penis. He also tried to put her hand on his penis but she pulled away and told him that she did not want to touch him.

The fifth incident occurred inside defendant's work van, parked outside of his shop. Defendant began rubbing Fa.'s thighs over her clothes before pulling her towards him, trying to kiss her, and planting an open-mouthed kiss on her cheek. Fa. managed to open the van door and exit.

Fa. eventually moved to a different foster home. She never told anyone the reason she wanted to move. Instead, she claimed she wanted to be closer to her school and her friends.

4. Disclosure

At first, Am. did not tell anyone about the abuse because she was scared no one would believe her, defendant would call her a liar, and defendant would be taken from the family. Defendant warned her it would be her "word against his." During her freshman year of high school, Am. told her friend, Leslie, that defendant had been molesting her. Leslie suggested Am. talk to her mother.

Eventually Am. and Ny. shared with one another that defendant had been molesting them. They were scared the news would tear their family apart. In September 2013, Am. and Ny. told R.N. that defendant had been molesting them. R.N. became angry and subsequently confronted defendant. She contacted Fa., who confirmed defendant had molested her and the other two girls. Fa. did not want disclose the molestation because she did not want to ruin defendant and R.N.'s relationship.

B. Defense

Defendant testified he did not touch the girls. Defendant claimed that Am.'s friend, Leslie, was friendly to him and did not act as if she did not want to be near him. R.N. testified that, after Leslie spent one night in their home in June 2013, R.N. told Am. that she did not want Leslie to come to their house again.

Defendant's mother visited in 2005, 2009, and 2012. She testified she did not notice anything amiss.

Defendant's son, Al., testified that, when he lived with defendant from 2008 to 2012, he never saw defendant touch any of the girls inappropriately and the three girls seemed to have good relationships with defendant.

III

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

Defendant made a motion for new trial based on a claim of IAC for failure to investigate and present evidence that (1) Am. and Ny. had physically abused Zy. and Zt. (defendant and R.N.'S adopted children); (2) R.N. had threatened to accuse defendant of child molestation after he confronted her about an affair with another man; and (3) Am. had a sexual encounter with Leslie when she spent the night. Additionally, defendant contended counsel failed to make an Evidence Code section 782 motion to admit evidence of sexual conduct of a complaining witness showing that Fa. had a relationship with R.N.'s son, as well as evidence that Fa. had a boyfriend.

We hold the trial court properly denied defendant's motion for a new trial and request for an evidentiary hearing because defendant failed to show trial counsel, Sean Davitt, rendered IAC.

A. Procedural Background

Defendant, represented by substitute counsel, Mario Rodriguez, filed a motion for a new trial and a request for an evidentiary hearing based on his claims that trial counsel, Davitt, had rendered ineffective assistance. Rodriguez speculated that Am. and Ny. could have falsely accused defendant because they were angry at defendant for reporting their physical abuse of Zy. and Zt. Rodriguez also argued R.N. encouraged her two daughters and Fa. to accuse defendant of molesting them because defendant had discovered R.N.'s relationship with another man. Rodriguez also argued that evidence of a sexual relationship between Am. and Leslie would show Leslie's bias and lack of credibility.

Rodriguez asserted that defendant's cell phone had contained photographs of Zy. and Zt.'s injuries, as caused by Am. and Ny., but that "somehow those photographs had been lost." The trial judge commented that the photographs were "only peripherally involved in the case" and "weren't direct evidence of anything." Rodriguez next explained that defendant was confused about whether he could or should testify about the alleged physical abuse. Rodriguez asked the trial judge to hold an evidentiary hearing to explain why Davitt did not investigate Am. and Ny.'s alleged physical abuse of their sisters, R.N.'s alleged affair, and Am.'s and Leslie's alleged sexual encounter.

The trial judge denied the motion for a new trial and request for an evidentiary hearing. The judge explained: "Well, I did sit through the trial. And I frankly thought

that Mr. Davitt was highly professional in his representation of [defendant]. [¶] I think the presumption that his decisions were tactical are — is well taken. All in all, I don't feel that there's been sufficient showing that there's a likelihood of a different result if any of the alleged ineffective assistance of counsel — were it to have been differently presented. [¶] And so I'm going to deny the request for an evidentiary hearing. And I'm also going to deny the Motion for a New Trial. I don't feel it is warranted. I feel that the trial was fair and appropriate."

B. Standard of Review

IAC, if proven, is a valid nonstatutory ground for a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583) A trial court's ruling on a motion for new trial is subject to appellate review for abuse of discretion. The trial court's """action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."""" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Upon appeal from the denial of a new trial motion based on a claim of IAC, an appellate court defers to the trial court's factual findings, express or implied, and upholds them if they are supported by substantial evidence. (*In re Valdez* (2010) 49 Cal.4th 715, 730; *People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) An appellate court reviews a trial court's conclusions of law and resolution of mixed questions of fact and law independently. (*Valdez,* at p. 730.) """Mixed questions 'include the ultimate issue, whether assistance was ineffective, and its components, whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense.'" [Citation.]' (*Ibid.*)"

To establish IAC, a defendant bears the burden of proving: (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-217.) Judicial scrutiny of counsel's performance is highly deferential. Because of the inherent difficulties of evaluation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland,* at p. 689.)

To establish prejudice there must be a reasonable probability that absent counsel's errors, "the factfinder would have had a reasonable doubt respecting guilt." (*Strickland v. Washington, supra,* 466 U.S. at p. 695; *People v. Williams* (1997) 16 Cal.4th 153, 215.) There cannot be simply speculation as to the effect of counsel's errors or omissions. (*In re Clark* (1993) 5 Cal.4th 750, 766.) Prejudice may be decided before the issue of effective performance. (*People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

C. Denial of the New Trial Motion

We conclude the trial court properly denied defendant's new trial motion and request for an evidentiary hearing based on defendant's claim that Davitt rendered ineffective assistance by failing to investigate and present evidence of Am. and Ny.'s alleged physical abuse of Zy. and Zt. First, defendant did not provide the court with any direct evidence of physical abuse. Defendant's own declaration and the defense

investigator's memorandum merely established that defendant told the defense investigator about the alleged abuse, not that the abuse was true. Defendant makes no offer of proof that Davitt would have found more evidence if he had investigated.

Second, the record on appeal shows Davitt did try to elicit testimony at trial about the alleged physical abuse of Zy. and Zt. Davitt twice attempted to question Ny. about her relationship with her adopted siblings. Both times, the trial court sustained objections on relevance grounds. In addition, Davitt tried to examine R.N. about whether she knew about Am. and Ny. "being mean or rough to the two adopted kids." The court again sustained a relevance objection. Davitt would not have been acting unreasonably if, for tactical reasons, he decided not to challenge the court's sustaining of the relevance objections or to make further attempts to introduce the irrelevant information.

Third, defendant's argument that Am. and Ny. were seeking revenge against him was wholly inconsistent with his trial strategy depicting him as a father figure who had a happy relationship with both girls. The California Supreme Court has recognized, "counsel does not render ineffective assistance by choosing one or several theories of defense over another." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007.) Defendant's disagreement in hindsight with the counsel's theory of the defense is not a sufficient reason for finding a deficient performance by trial counsel. As the trial court explained, Davitt's representation of defendant was "highly professional," the presumption that Davitt's decisions were tactical was "well taken," and there was an inadequate showing of a more favorable result but for Davitt's failure to present evidence of the purported physical abuse. Defendant failed to meet his burden of proof to show

that Davitt's representation fell below an objective standard of reasonableness under prevailing professional norms and that there was a reasonable probability defendant would have had a more favorable result but for Davitt's failure to present evidence of Am. and Ny.'s physical abuse of their adopted siblings. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

Similarly, it was not IAC for Davitt not to investigate R.N.'s motives for purportedly fabricated allegations against defendant. Defendant had told the defense investigator that he confronted R.N. about her affair with another man and threatened to move out of the house and ask for joint custody of their adopted daughters. Defendant claimed that R.N. responded by threatening to report that he had molested Am. and Ny. Then defendant learned that R.N. had gone to Child Protective Services and accused him.

Again, defendant did not make an offer of proof other than his personal knowledge of the affair. The evidence would not have shown R.N.'s bias and it would not have provided a motive for her to accuse defendant of molestation: "[C]ounsel does not render ineffective assistance by choosing one or several theories of defense over another." (*People v. Cunningham, supra*, 25 Cal.4th at p. 1007.) After Davitt learned that R.N. was negatively affected financially by defendant's arrest and prosecution, Davitt could reasonably conclude that the existence of an affair was irrelevant and abandon the theory that R.N. accused defendant of child molestation for financial gain. Thus, defendant failed to demonstrate that (1) Davitt performed deficiently in making the tactical decision not to present evidence of R.N.'s alleged affair or threat, and (2) that defendant was

prejudiced by Davitt's tactical decision. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

Defendant also did not establish that Davitt rendered ineffective assistance by not investigating and presenting evidence that Am. and her friend, Leslie, had some type of sexual encounter[5] to rebut the inference that Am. had no previous knowledge about sex and to establish a motive for Leslie to lie for Am. Am.'s description of defendant's misconduct consisted of defendant reaching underneath her brassiere and rubbing her breasts and unsuccessfully trying to put his hand down her pants. Any evidence of Am. and Leslie "having sex" would not be equivalent behavior to show Am.'s awareness of sexual practices. Furthermore, Am. was old enough to have some sexual knowledge independent of any relationship with Leslie. Even if Leslie and Am. did have a sexual encounter, it did not serve to establish that Leslie lied about Am. confiding that defendant had molested her.

Instead, Davitt argued he needed to present evidence about why R.N. had banned Leslie from visiting. Pursuant to Evidence Code section 352, the court permitted Davitt to establish the circumstances under which Leslie was banished but the court made clear that it was excluding evidence of any sexual contact between Leslie and Am. Thus, the record shows that Davitt made a tactical decision to present only the fact there was an incident which led to Leslie's banishment so that the jury would not speculate that Leslie never visited defendant's home because he was a child molester. The trial court agreed

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[5] Defendant did not provide any evidence as to the details of the purported sexual encounter.

that any evidence of Am. and Leslie's sexual conduct should be excluded under Evidence Code section 352.

In light of the court's evidentiary ruling, Davitt's tactical decision was not unreasonable. (*People v. Coffman* (2004) 34 Cal.4th 1, 86.) It would have been futile for Davitt to elicit information regarding the sexual encounter: "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387; see *People v. Lucero* (2000) 23 Cal.4th 692, 732.) Simply stated, defendant failed to demonstrate Davitt performed deficiently in not presenting evidence of Am. and Leslie's sexual encounter or that defendant was thereby prejudiced.

Defendant also charges that Davitt did not file a motion under Evidence Code section 782 to present evidence about Fa.'s relationship with R.N.'s son and evidence that Fa. had another boyfriend to impeach Fa.'s testimony that she moved out because defendant was molesting her. Fa. testified that when she moved into another foster home, she told the social workers that she wanted to move to be closer to her school, friends, and boyfriend, and she felt "cramped" in defendant's home. Fa. did not report the molestation until she was contacted by law enforcement many years later.

R.N. testified that Fa. had a "crush" on F.N.'s son that ended quickly, and that Fa. wanted to move out about seven to eight months later. Defendant testified Fa. had a romantic relationship with F.N.'s son and another boyfriend at the same time. The court excluded the latter information on the ground of non-responsiveness. Defendant also

testified that Fa. moved out of his house so she could be closer to her school and friends, not due to any relationship issues.

Therefore, the record reflects that there was evidence about Fa.'s relationship with two boyfriends except to the extent it was limited by the court and not by Davitt's failure to file an Evidence Code section 782 motion. The record shows that Fa. had only a brief crush on R.N.'s son but did not leave for seven or eight months. Additional evidence of Fa.'s romantic relationships would not have impeached her testimony that she moved out of the foster home because defendant molested her. Filing an Evidence Code section 782 motion would not have achieved a different result. Defendant did not show deficient performance by Davitt, a reasonable probability of a more favorable outcome, or prejudice.

Given the compelling testimony of the victims, the corroborating testimony by Leslie and R.N., and the fact that defendant molested all three girls similarly—approaching them when they were asleep and slipping his hands underneath their clothes to rub their breasts and genitals—there was no reasonable probability that defendant would have achieved a more favorable result but for Davitt's purported IAC. The trial court properly denied defendant's motion for new trial and request for an evidentiary hearing based on IAC.

We also reject defendant's bald assertion that he was constructively denied representation. Instead, the record firmly establishes that Davitt competently represented defendant throughout trial. This case does not come within the exception to the rule requiring the showing of prejudice set forth in *Strickland v. Washington*, *supra*, 466 U.S.

668. (See *United States v. Cronic* (1984) 466 U.S. 648, 659-660.) Defendant's claim is entirely without merit.

IV

DISPOSITION

We hold there was no IAC or constructive denial of representation. We affirm the judgment.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.